Filed 12/10/03 In re D.D. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D. D., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. DEREK D., Defendant and Appellant.	F042527 (Super. Ct. No. JD98010) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Kristin Bryce Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

B. C. Barmann, Sr., County Counsel, and Tom Clow, Deputy County Counsel, for Plaintiff and Respondent.

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Derek D., who is incarcerated, appeals a juvenile court's dispositional orders. The orders do not provide appellant reunification services and do not require the Kern County

Department of Human Services (Department) to transport his six-month old daughter, D., for visits to his place of incarceration. We affirm the orders.

FACTUAL AND PROCEDURAL HISTORY

D. was removed from her mother's care at three weeks old after she was born with a positive toxicology screen for phencyclidine (PCP) and exhibited signs of withdrawal. Her mother had previously left the hospital with her against medical advice. Appellant, who is married to mother[1] and is D.'s presumed father, was incarcerated both at the time D. was born and when she was removed from the mother's custody, and will remain incarcerated until March 2006, or at least 2 years. Father submitted on jurisdiction.

As for disposition, counsel for appellant indicated appellant did not seek services or placement, but was requesting visitation. Counsel for the minor sought clarification on the waiver of services issue, asking "Well, I want to make sure I understand this. Is he waiving services?" To which the court replied, "He is not requesting services, which is a little different." The court never obtained a formal waiver of services from appellant.

The court then refused to order visitation, noting that appellant was not receiving services and that "I think visits are a service." After noting that travel to appellant's place of incarceration was "about a five-hour drive" and the child was only six months old, the court stated it was "not going to prohibit [visits]. But I'm not going to order it, either." Appellant timely appeals.

DISCUSSION

Appellant first maintains that he is entitled to reunification services and the court's failure to obtain a valid waiver of services under Welfare and Institutions Code section 361.6, subdivision (b)(14)[2] renders any indication by him that he did not want services

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[1] Mother is not a party to the appeal.

[2] Further statutory references are to the Welfare and Institutions Code.

invalid. Respondent acknowledges that the court did not enter a formal waiver of services, but maintains that any error was harmless because appellant had already expressly declared that he was not interested in receiving services. We agree with respondent that the error was harmless.

Any error in failing to obtain a waiver of services was harmless.

"A parent may waive his or her constitutional rights to relationships with the child 'as long as the waivers are "voluntary [citations] and knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."' [Citations.]" (*Cynthia C. v. Superior Court* (1999) 72 Cal.App.4th 1196, 1201.) The relevant portion of section 361.5, subdivision (b)(14) (formerly (b)(13))states:

> "Reunification services need not be provided to a parent ... described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] ... [¶] (14) That the parent ... of the child has advised the court that he or she is not interested in receiving family maintenance or family reunification services or having the child returned to or placed in his or her custody and does not wish to receive family maintenance or reunification services. [¶] The parent ... shall be represented by counsel and shall execute a waiver of services form to be adopted by the Judicial Council. The court shall advise the parent ... of any right to services and of the possible consequences of a waiver of services, including the termination of parental rights and placement of the child for adoption. The court shall not accept the waiver of services unless it states on the record its finding that the parent ... has knowingly and intelligently waived the right to services." (See also Cal. Rules of Court, rule 1456(f)(5)(M).)

Here, there is no question the court did not jump through the procedural hoops of the waiver envisioned by subdivision (b)(14). Generally, the dependency statutes contemplate a formal written and oral waiver of services. However, failure to comply with the statute was procedural error and under the facts of this case, harmless, in that it is not reasonably probable a different result would have occurred absent the error and no miscarriage of justice occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Even if appellant had requested services, the court had before it undisputed evidence to support a

denial of services under section 361.5, subdivision (e)(1) [no services to incarcerated parent due to child's age, lack of bond, length of incarceration, etc.]: appellant's length of incarceration would well exceed the time limits of allowed services, D. was only six months old, appellant had been incarcerated at the time of D.'s birth, and appellant had only even seen D. once through a window. Thus, it is not reasonably probable appellant would have received services had he even requested them. Further, because appellant plainly asserted he was not seeking services, the court's failure to affirmatively deny services under section 361.5, subdivision (e)(1) was invited error. (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339.)

Finally, while appellant maintains services basically "couldn't hurt" since the mother is receiving services and the parents will presumably reunite once appellant serves his sentence, we note that nothing is preventing appellant from bettering himself in whatever way he can during his period of incarceration. We find no reversible error.

Without reunification services, the court had discretion to order visits with or without a finding of detriment.

Appellant next complains that even if his waiver of services is considered valid or harmless error, the court nevertheless erred in refusing to order the Department to provide him with visits absent a finding that such visits would be detrimental to D. He maintains that, in fact, the court concluded visits would *not* be detrimental since it allowed the visits if the caregiver wanted to make the trip, but was not going to require the Department transport D. to see appellant in prison.

Visitation to an incarcerated parent is one of the services generally intended to support the return to parental custody. (§ 361.5, subd. (e)(1)(C).) While the juvenile court's statement that "visits are a service" is not entirely accurate – courts are often directed by statute to allow or provide visitation despite no other services being offered – in this case the court was correct that it was not *required* to give appellant visits when he

would not be receiving any other services. Section 361.5, subdivision (e)(1) requires that a juvenile court "shall order" that reasonable reunification services be provided to an incarcerated parent unless it determines that services would be detrimental to the child. However, section 361.5, subdivision (f), provides:

> "If the court, pursuant to paragraph (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), or (15) of subdivision (b) or paragraph (1) of subdivision (e), *does not order reunification services*, it shall, at the dispositional hearing, that shall include a permanency hearing, determine if a hearing under Section 366.26 shall be set in order to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan for the child. If the court so determines, it shall conduct the hearing pursuant to Section 366.26 within 120 days after the dispositional hearing. *However, the court shall not schedule a hearing so long as the other parent is being provided reunification services pursuant to subdivision (a). The court* ***may*** *continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child*." (§ 361.5, subd. (f), italics added.)

Thus, once it is established a parent will not be receiving reunification services, section 361.5, subdivision (f) gives the court *discretion* to allow the incarcerated parent to continue visitation with his or her child unless it finds that visitation would be detrimental to the child. If the court specifically finds detriment, subdivision (f) provides that the court does not have discretion to continue to permit visitation. Here, appellant is correct that the court clearly did not believe visits would be detrimental to D. in that the court was comfortable allowing visits to occur, it was just not going to *require* the visits to occur. However, the statute expressly states that when the court does not order reunification services, it "*may continue to permit*" the parent to visit the child unless it finds that visitation would be detrimental. (§ 361.5, subd. (f).) The statute does not say that the court "shall" continue to permit visitation unless it finds that visitation would be detrimental to the child. "May" in subdivision (f) does not mean "shall." (Compare § 366.21, subd (h) [where section 366.26 hearing is set for non-incarcerated parent and

reunification services are terminated, the court "shall" continue visitation unless it would be detrimental to the child.].)

In this case, as explained above, appellant's expected length of incarceration exceeds any time for reunification; he has never had any relationship with D.; he has only even seen her once through glass; and he is incarcerated approximately five hours away from D.'s caregivers. Because, as explained above, there was no error in denying appellant reunification services, section 361.5, subdivision (f) applied and the court *did not have to make a finding of detriment* in order to refuse to require Department to transport D. for visits. Under these circumstances, we cannot say the juvenile court abused its discretion in not ordering that appellant receive visits where he has no prospects of gaining custody and there was absolutely no evidence or hope of any parent-child relationship between appellant and D. within the statutory reunification period. Because (under section 361.5, subdivision (f)) the court did not have to make a finding of detriment to deny visits, the court's order to "allow" visits but not "require" them is appropriate.

DISPOSITION

The judgment is affirmed.

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Ardaiz, P.J.

WE CONCUR:

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Gomes, J.

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Dawson, J.